84-971

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No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM 1984

NICK KAPNISON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the exclusion of the deposition testimony of a co-defendant taken in a civil case wherein the material allegations of the indictment were denied under oath deprived the petitioner of due process of law.

2. Whether there is a crime-fraud exception to the confidential communications privilege between husband and wife.

3. Whether selective enforcement of the husband-wife privilege violated the petitioner's rights to due process of law.

PARTIES TO THE PROCEEDING

The only parties to the proceeding are those listed in the caption. Ben Bronstein and Hank Harenberg were jointly indicted as co-defendants with Kapnison, but the trial court granted a defense motion for severance. Separate proceedings resulted in the convictions of the co-defendants.

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NICK KAPNISON, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Nick Kapnison petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App. Infra. a-1-25) is reported at 743 F.2d 1450. The opinion of the District Court is not reported.

JURISDICTION

The decision of the Court of Appeals was filed on September 4, 1984. A petition for rehearing was denied on October 22, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment provides in pertinent part:

> No person . . . shall be compelled in any criminal

case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . .

The Sixth Amendment provides in pertinent part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . .

STATEMENT

In an 18-count superseding indictment filed in the United States District Court for the District of New Mexico, Nick Kapnison, Ben Bronstein, and Henry Harenberg were charged with conspiracy to impede the United States in its collection of income taxes in violation of 18 U.S.C. 371; making a false tax return in violation of 26 U.S.C. 7206(1); misapplication of funds of an FDIC-insured bank in violation of 18 U.S.C. 656; and participating in a loan kickback scheme in violation of 18 U.S.C. 215.

Essentially, the government charged that in connection with seven loans obtained from the First National Bank of Clovis, whose deposits are insured by the Federal Deposit Insurance Corporation, the defendants conspired to obtain loans for various borrowers, received kickbacks from the proceeds of said loans, and divided the kickbacks amongst themselves without truly reporting their respective incomes. Kapnison was an Albuquerque businessman, Bronstein was the owner of the First National Bank of Clovis, and Harenberg was president of the bank. Each defendant received a separate trial.

Harenberg's trial was concluded some three weeks before the commencement of Kapnison's trial. (App. a-3) Bronstein had not yet been tried. Prior to Kapnison's trial, Bronstein filed an affidavit in which he stated that if called to testify he would invoke his Fifth Amendment

privilege and refuse to testify on Kapnison's behalf. The government conceded that under such circumstances, Bronstein was "unavailable" under Fed.R.Evid. 804(a)-(1). (App. a-15)

During his trial, Kapnison sought to offer the deposition of Bronstein taken in a civil case then pending in the state court of New Mexico as substantive evidence. In that civil case the First National Bank of Clovis sued a borrower who defaulted on one of the loans at issue in the criminal case. In the state civil case the borrower filed a third-party complaint against Bronstein, Kapnison, and Harenberg, alleging that Kapnison agreed to procure a loan for the borrower, that Kapnison was paid a fee out of the proceeds of the loan for doing so, that Kapnison, Bronstein, and Harenberg conspired to procure the loan, and that with respect to the fee charged by Kapnison, this constituted a misapplication of bank funds.

In the criminal case, the government's theory was that Harenberg would initiate the loans, Kapnison would guarantee or broker the loans and receive a fee from the proceeds of the loan, that Bronstein would cause the loans to be approved, and that the proceeds of the fees paid to Kapnison would be divided amongst Kapnison, Bronstein, and Harenberg. In the deposition taken in the civil case, Bronstein denied under oath that he received any benefit, any consideration, any value, any money of any sort in connection with the making of the loan, or that he received any portion of the proceeds from Kapnison or anyone else. (App. a-16)

When the deposition testimony was offered, the United States argued that it would be improper to admit the deposition testimony since it had not cross-examined

Bronstein at the deposition. Kapnison argued that as long as there was an identity of interest as between the parties conducting the deposition and the party against whom the deposition was offered, the Federal Rules of Evidence regarding the admissibility of an "unavailable" witness were satisfied. The trial court denied Kapnison's motion.

On appeal, the Court of Appeals held that the deposition testimony was inadmissible under Fed.R.Evid. 804(b)(1) because the United States did not have the opportunity to cross-examine Bronstein at the deposition. The Court of Appeals further held that the deposition did not have sufficient "indicia of reliability" for its admission in a criminal proceeding under the residual exception set forth at Fed.R.Evid. 804(b)(5). (App. a-16 - a-17)

The chief witness against Kapnison was his ex-wife, Natalyn. In response to Kapnison's assertion of the husband-wife privilege, and the resulting evidentiary issues, the trial court ruled:

> Well, right now, I'll tell you so you can be thinking about it, that I'm not going to let her testify as to anything that Mr. Kapnison related to her during the course of the marriage. She can testify as to acts. She can testify as to statements that were made in the presence of others and as far as your tape is concerned, it's going to have to be established conclusively that there was someone else present when the statement was made. She also may testify as to anything that she may have said, but not in a manner that would repeat what Mr. Kapnison had told her or would indicate the answer or statement that Mr. Kapnison had made to her. And this is my plan at this time. If you gentlemen want to think about it and talk about it in morning you can do so. (App. a-7 - a-8)

Kapnison asserted that any knowledge which his ex-

wife, Natalyn, had concerning the splitting of fees with Bronstein and Harenberg was acquired by her during the course of their marriage. It was, accordingly, asserted that anything Natalyn Kapnison did was a "testimonial act" which derived from the confidential marital communications. In the course of attempting to cross-examine the ex-wife, Natalyn, each time the government inquired as to the source of her knowledge - her husband, Nick Kapnison - if the question were asked and answered, this would be deemed a waiver of the confidential communication privilege between husband and wife. Furthermore, at the conclusion of her testimony, Natalyn Kapnison asserted the confidential communication privilege to prevent Mr. Kapnison from testifying about confidential communications between herself and Kapnison during their marriage. (App. a-13)

Kapnison's motion for a mistrial based upon the foregoing series of events was denied. The Court of Appeals held that since Natalyn testified as a participant, her testimony was admissible under a "crime-fraud" exception to the marital communications privilege. Similarly, the Court of Appeals rejected Kapnison's arguments that selective enforcement of the privilege operated to deprive Kapnison of due process of law. The Court of Appeals held that Natalyn could neither be compelled to testify nor foreclosed from testifying, citing *Trammel v. United States*, 445 U.S. 40 (1980), and once again reiterating that the testimony was admissible under the crime-fraud exception which it created. (App. a-7 - a-10; a-13)

REASONS FOR GRANTING THE PETITION

When this Court originally promulgated Fed.R.Evid. 804(b)(1), if a party with motive and interest similar to

those of the party against whom the prior testimony was then being offered had an opportunity to develop the testimony by direct, cross, or redirect examination, the prior testimony would be admissible. As adopted by Congress, the current rule requires that the party against whom the testimony is now offered (or in a civil action or proceeding a predecessor in interest) had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination. 4 *Weinstein's Evidence*, pp. 804-7 to 804-8 (1984). In this case, Kapnison respectfully submits that the refusal to allow the admission of the depoition testimony was in violation of his due process rights.

It has been suggested that a refusal to admit hearsay evidence *offered* on behalf of a criminal defendant amounts to a denial of due process if the declarant is unavailable and the evidence is reasonably reliable. Comment, *The Criminal Defendant Hearsay Evidence: Time For A Change*, 47 Tex.L.Rev. 250, 265 (1969). In reversing the conviction on due process grounds because the defendant was not given the opportunity to introduce hearsay evidence on his own behalf, this Court stated in *Chambers v. Mississippi*, 410 U.S. 284 (1973), at 302:

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trial than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here

> bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.
>
> (Citations omitted.)

At the time that Bronstein's deposition testimony was taken, the government's investigation was continuing. The testimony was given under oath and it was elicited by a party seeking to establish that there was a "splitting" of the fees between Kapnison, Bronstein, and Harenberg. The deposition testimony was crucial to Kapnison's defense. In these circumstances, Kapnison respectfully submits that the exclusion of the offered evidence was in violation of his rights to due process of law. See, *United States v. Benveniste*, 564, F.2d 335, 341-342 (9th Cir. 1977). This is because the statements made by Bronstein in the foregoing context had sufficient indicia of trustworthiness. See, *Zeigler v. Callahan*, 659 F.2d 254 (1st Cir. 1981).

In *United States v. Carlson*, 547 F.2d 1346 (8th Cir. 1976); *United States v. West*, 574 F.2d 1131 (4th Cir. 1978); and *United States v. Garner*, 574 F.2d 1141 (4th Cir. 1978), cert. denied, ... U. S. ...., 99 S.Ct. 333 (1978), the grand jury testimony of "unavailable witnesses" was admitted against the defendants as substantive testimony. In *United States v. Gonzales*, 559 F.2d 1271 (5th Cir. 1977), and *United States v. Fiore*, 443 F.2d 112 (2nd Cir. 1971), it was held that the grand jury testimony was inadmissible.

In *Ohio v. Roberts*, 448 U.S. 56 (1980), this Court held

that the admission of testimony given by a witness at the preliminary hearing during the defendant's trial did not violate that defendant's Sixth Amendment right to confront the witnesses against him. In contrast, in *United States ex rel Bracey v. Fairman*, 712 F.2d 315 (7th Cir. 1983), the court ruled that the admission of testimony given in the preliminary hearing which was offered by the defendant was not constitutionally required in that case because the prosecution's opportunity to cross-examine did not constitute by itself reliability and the testimony was unreliable.

The Court should grant certiorari to determine what rights a defendant has in defending against criminal charges to introduce evidence of this kind under the Federal Rules of Evidence and the United States Constitution. See, *Garner v. United States*, 439 U.S. 936 (1978) (Stewart and Marshall, JJ. dissenting).

In this case, and in *United States v. Neal*, 743 F.2d 1441 (10th Cir. 1984), the Court of Appeals creates a "crime-fraud" exception to the husband-wife confidential communications privilege.

In *Ivey v. United States*, 344 F.2d 770 (5th Cir. 1965), the court did not consider whether the wife's testimony was admissible since she was also involved in the commission of the offenses. In *Appeal of Malfitano*, 633 F.2d 276 (3rd Cir. 1980), the Third Circuit refused to create a "crime-fraud" exception to the privilege of the testifying spouse who refused to testify even though the spouse was also involved in the commission of crimes. However, the Third Circuit refused to extend such protection to confidential communications occurring between husband and wife, relying on the so-called "crime-fraud" exception.

United States v. Ammar, 714 F.2d 238 (3rd Cir. 1983), cert. denied, ... U.S. ...., 104 S.Ct. 344 (1983).

Wharton's Criminal Evidence, 13th Ed. (1973), states at Section 568:

> The husband-wife privilege extends, not only to a spouse's communication, oral or written, but also to an act which is confidential in nature, or which would not have been performed in the witnesses' presence but for the marital relation. *The privilege applies even though the observed spouse's act amounted to or evidence the commission of a crime.*
>
> (Emphasis added.)

For example, in *Shepherd v. State*, 277 N.E.2d 165 (Ind. 1971), the court refused to allow the admission of testimony on the part of the husband even though the husband observed a crime being committed. Similarly, in *United States v. Geller*, 560 F.Supp. 1309 (E.D. Pa. 1983), the district court ruled that recordings of confidential communications between the husband and wife were inadmissible under the husband-wife privilege, citing *Appeal of Malfitano, supra*, and *In Re Grand Jury Matter*, 673 F.2d 688 (3rd Cir. 1982), cert. denied, ... U.S. ...., 103 S.Ct. 375 (1982), even though a crime was involved.

In contrast, various courts have asserted that a "crime-fraud" exception to confidential communications between husband and wife is recognized. See, *United States v. Broome*, 732 F.2d 363 (4th Cir. 1984); *United States v. Entrekin*, 624 F.2d 597 (5th Cir. 1980); *United States v. Mendoza*, 574 F.2d 1373 (5th Cir. 1978), cert. denied, 439 U.S. 988 (1978); *United States v. Kahn*, 471 F.2d 191 (7th Cir. 1972), rev'd. on other grounds, 415 U.S. 143 (1974); *United States v. Price*, 577 F.2d 1356 (9th Cir. 1978), cert. denied 439 U.S. 1068 (1979).

Thus, there appears to be emerging in the circuits a majority rule which holds that when the husband and wife are jointly engaged in a crime, they are "co-conspirators" and confidential communications occurring between them are admissible, notwithstanding the husband-wife privilege against the disclosure of confidential communications. The Court should grant certiorari in this case to review the parameters of such an exception, if indeed one exists.

In *Trammel v. United States*, 445 U.S. 40 (1980), this Court continued to give validity and recognition to the privilege of one spouse to refuse to testify against the other. It modified *Hawkins v. United States*, 358 U.S. 74 (1958), only by stating that the privilege lay with the testifying spouse exclusively. Thus, this Court has continued to give recognition and viability to husband-wife privileges.

Kapnison respectfully submits that the so-called exception will, in effect, swallow up the confidential communications privilege between a husband and wife. Moreover, should such an exception be recognized, the parameters of such an exception must be clearly set forth and the prerequisites for the introduction of confidential communications under this so-called exception must be set forth. For example, under the crime-fraud exception to the attorney-client privilege, the government must first establish by evidence *independent* of the confidential communications the existence of the crime or fraud. See, e.g., *United States v. Dyer*, 722 F.2d 174 (5th Cir. 1983). There is a similar requirement for admitting the declarations of co-conspirators. See, *United States v. Simpson*, 709 F.2d 903 (11th Cir. 1983); *United States v. Robinson*, 707 F.2d 811 (4th Cir. 1983). *United States v. Kahn*, *supra*, relies upon Note, Future Crime or Tort Exception

to Communications Privilege, 77 Harv.L.Rev. 730 (1964), in recognizing a "crime-fraud" exception to the confidential communications privilege. This Note also recognizes that there must be sufficient evidence aside from the communication to warrant a finding of the illegal purpose whether the communication is between husband and wife or attorney and client.

The Court of Appeals relied upon the "crime-fraud" exception to the confidential communications privilege in refusing to answer Kapnison's argument that selective enforcement of the privilege in this case denied him due process of law. The Fifth Circuit has recognized that the confidential communications privilege was not intended to allow one spouse to provide his or her own version of a particular communication while preventing the other version from being disclosed. *United States v. Brown*, 634 F.2d 819, 829 (5th Cir. 1981). Selective enforcement of a privilege has been universally condemned. See, *2 Weinstein's Evidence*, Paragraph 511[02], p. 511-7, at Footnote 18 (1982). Selective enforcement of the marital privilege in the circumstances of this case deprived Kapnison of his Sixth Amendment right to confront the witnesses against him, and in particular, the chief witness, his ex-wife Natalyn. See, e.g. *United States v. Nixon*, 418 U.S. 683 (1973); *Davis v. Alaska*, 415 U.S. 308 (1974); *Washington v. Texas*, 388 U.S. 14 (1967).

In *United States v. Neal*, *supra*, Judge Logan, in his concurring opinion sets forth persuasive reasons why a crime-fraud exception to the confidential marital communications privilege should not be adopted. Judge McKay, also from the Tenth Circuit, also sets forth persuasive reasons for not adopting such an exception in his dissent in *United States v. Trammel*, 583 F.2d 1166 (10th Cir.

1978), aff'd. on other grounds, 445 U.S. 40 (1980). The circuits are split on this specific question. Moreover, assuming such an exception exists, the proper parameters of the exception have not yet been established. Further, assuming such an exception exists, the foundational requirements for introducing evidence in violation of the privilege have not been clearly delineated. Finally, Kapnison respectfully submits that even if such an exception exists, it is not sufficient to overcome a claim of selective enforcement of the privilege.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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DECEMBER 1984

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee,	)	
v.	)	No. 82-1850
NICK KAPNISON, Defendant-Appellant.	)	

Appeal from the United States District Court
For the District of New Mexico
(D.C. No. CR 81-144-1)

Richard J. Smith, Assistant United States Attorney (William L. Lutz, United States Attorney, with him on the brief), Albuquerque, New Mexico, for Plaintiff-Appellee.

Michael E. Vigil of Marchiondo & Berry, P.A., Albuquerque, New Mexico, for Defendant-Appellant.

Before BARRETT and LOGAN, Circuit Judges, and JENKINS, District Judge.*

BARRETT, Circuit Judge.

* Honorable Bruce S. Jenkins of the United States District Court for the District of Utah, sitting by designation.

Nick Kapnison (Kapnison) appeals from an adverse jury verdict in which he was found guilty of conspiring to impede the United States in its collection of income taxes in violation of 18 U.S.C.A. § 371, making a false tax

return in violation of 26 U.S.C.A. § 7206(1), participating in the misapplication of funds of an F.D.I.C.-insured bank in violation of 18 U.S.C.A. § 656, and participating in a loan kickback scheme in violation of 18 U.S.C.A. § 215.

Kapnison, Ben Bronstein, and Henry Harenberg were jointly indicted in an eighteen-count superseding indictment filed in Albuquerque, New Mexico, on September 1, 1981. The indictment charged that Kapnison, an Albuquerque businessman, Bronstein, the owner of the First National Bank of Clovis (Bank) and Harenberg, president of Bank, conspired to obtain loans from Bank for various borrowers, and thereafter received kickbacks from the proceeds of the loans and agreed to divide the kickbacks among themselves without correctly reporting their respective incomes. Upon motion, each defendant received a separate trial.

Prior to trial, Kapnison filed various motions: to dismiss the indictments on the grounds of prosecutorial misconduct in obtaining the testimony of attorneys before the Grand Jury; to suppress all tapes, recordings and statements in the possession of the government obtained via conversations between Kapnison and his ex-wife Natalyn; to sever the counts of the indictment because of prejudice; to move the trial to a different division because of massive pretrial publicity; and to dismiss the indictment on the ground that the government had engaged in gross prosecutorial misconduct in eliciting testimony from Natalyn. All of Kapnison's motions were denied.

Harenberg was tried at Roswell, New Mexico, and convicted of all the charges against him. Thereafter, and prior to Kapnison's scheduled trial in Roswell, Kapnison moved to avoid trial in Roswell, citing the publicity sur-

rounding Harenberg's trial and conviction. Kapnison also moved for individual voir dire of the jury pool, citing the publicity attendant to Harenberg's trial. These motions were denied by the court. Kapnison was tried in Roswell some three weeks after Harenberg was tried and convicted.

The government developed its case against Kapnison through the testimony of numerous witnesses, including his wife, Natalyn, the seven borrowers who received loans from Bank, the investigating officers, and IRS Agent B. W. Wilson who testified as a summary witness.

On appeal, Kapnison raises ten allegations of error which we shall consider in the order presented.

I.

Kapnison contends the district court erred in denying his motion to dismiss the indictment. Kapnison moved to dismiss alleging that "the government may have presented evidence which is violative of various privileges guaranteed to [him]." [R., Vol. I at 22]. In denying this motion, the district court found:

> Kapnison has moved to dismiss the Grand Jury Indictment for prosecutorial misconduct. Kapnison maintains that the United States acted improperly in eliciting testimony before the Grand Jury in violation of the attorney-client privilege. I will again consider defendant's motion if it is established that there was any attorney-client relationship between Kapnison and any of the witnesses before the Grand Jury. [R., Vol. I at 52].

On appeal, Kapnison contends that government agents contacted his wife, Natalyn, while he was a "target" of the grand jury and in the midst of a divorce action, and coerced her to become an agent for the government in connection with the pending matters before the grand

jury. Kapnison aruges that the conduct of the government's agents was particularly egregious when, as here, the agents took advantage of the fact that he was involved in divorce proceedings and attempting to reconcile with his wife. Kapnison argues that the government's conduct, coupled with Natalyn's subsequent testimony before the grand jury, was in violation of his fifth and sixth amendment rights, a deception of the grand jury, and in violation of confidential marital communications between Natalyn and himself.

The district court rejected these same arguments in denying Kapnison's motions to quash the indictment and suppress tape recorded conversations. The court noted:

> Dismissal of an indictment for prosecutorial misconduct is appropriate in egregious circumstances where conduct has clearly crossed into the realm of deliberate misconduct, *United States v. Houghton*, 554 F.2d 1219 (1st Cir. 1977). Defendants have not demonstrated the United States is guilty of misconduct. There was no showing whatsoever that Natalyn Kapnison was coerced into cooperating with the United States. Mrs. Kapnison testified she cooperated with the government voluntarily. No evidence was presented to the contrary. [R., Vol. I at 289].

We agree with the district court's finding that Natalyn testified voluntarily. We find the following testimony significant:

> Q [Mr. Marchiondo, Attorney for Kapnison]. Your husband did not want a divorce, and wanted to remain married to you at that time, is that correct?
>
> A [Natalyn Kapnison]. No, sir, that is not correct. And I might remind you, Billy, of the —
>
> Q You call me Mr. Marchiondo for this trial, please.

A I'm sorry.

Q We know each other, do we not?

A Yes, sir.

Q I've known you for some 25 years?

A Yes. I didn't mean to be rude that way by calling you Billy, but if you remember the three-way conversation, this was before the grand jury, and I don't want to be offensive here in this courtroom, but Nick was on one phone, I was on another, and you were on another. And he says, "I've been trying to get rid of this so-and-so for 20 years, and now she wants a divorce when it's inconvenient."

And I pleaded with you to help me, that I was afraid. And you said, "Can't you both act like two adults?"

Q Let's get to the question, Mrs. Kapnison.

A So he was not trying to reconcile at that time, no, sir.

Q And even from that time on through January, through February and even before the divorce, he tried to persuate you not to get a divorce, isn't that so?

A No, sir. At that time, he did not. I don't remember the exact dates, but when the grand jury subpoenaed me is when he started being nice.

[R., Vol. III at 83-84].

We reject Kapnison's contention that his wife's testimony before the grand jury and at trial was in violation of his privilege against adverse spousal testimony. Natalyn was properly allowed to testify under a grant of immunity from the government. This issue was resolved in *Trammel v. United States*, 445 U.S. 40 (1980). The *Trammel* Court said:

> When one spouse is willing to testify against the other in a criminal proceeding—whatever the motivation—their relationship is almost certainly in disrepair; there is probably little in the way of marital harmony for the privilege to preserve. In these circumstances, a rule of evidence that permits an accused to prevent adverse spousal testimony seems far more likely to frustrate justice than to foster family peace. Indeed, there is reason to believe that vesting the privilege in the accused could actually undermine the marital relationship. For example, in a case such as this, the Government is unlikely to offer a wife immunity and lenient treatment if it knows that her husband can prevent her from giving adverse testimony. If the Government is dissuaded from making such an offer, the privilege can have the untoward effect of permitting one spouse to escape justice at the expense of the other. It hardly seems conducive to the preservation of the marital relation to place a wife in jeopardy solely by virtue of her husband's control over her testimony . . . .
>
> IV
>
> Accordingly, we conclude that the existing rule should be modified so that the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying. This modification—vesting the privilege in the witness-spouse—furthers the important public interest in marital harmony without unduly burdening legitimate law enforcement needs.

445 U.S. at 52-53 (footnotes omitted).

Thus, Natalyn's voluntary cooperation with the government, and her testimonial appearances before the grand jury and the trial jury were not in violation or derogation of Kapnison's fifth and sixth amendment rights. Even were we to assume, which we do not, that prosecutorial misconduct actually occurred, dismissal of

the indictment would be nonetheless inappropriate. In *United States v. Drake*, 655 F.2d 1025 (10th Cir. 1981), we stated:

> No actual prejudice to a fair trial for Drake is shown by the misconduct. We believe this case is controlled by *United States v. Morrison*, 449 U.S. 361, 101 S.Ct. 665, 66 L.Ed.2d 564 (1981), in which the Supreme Court held that dismissal based on a prosecutor's violation of a defendant's Sixth Amendment rights was improper.
>
> > "[A]bsent demonstrable prejudice, or substantial threat thereof, dismissal of the indictment is plainly inappropriate, even though the violation may have been deliverate. This has been the result reached where a Fifth Amendment violation has occurred, and we have not suggested that searches and seizures contrary to the Fourth Amendment warrant dismissal of the indictment. The remedy in the criminal proceeding is limited to denying the prosecution the fruits of its transgression."

665 F.2d at 1027, quoting *United States v. Morrison*, 449 U.S. 361 (1981).

Kapnison's allegation that Natalyn's testimony was in violation of confidential marital communications between Natalyn and himself is without merit. Before Natalyn testified, the district court made the following preliminary ruling out of the presence of the jury:

> THE COURT: Well, right now, I'll tell you so you can be thinking about it, that I'm not going to let her testify as to anything that Mr. Kapnison related to her during the course of the marriage. She can testify as to acts. She can testify as to statements that were made in the presence of others and as far as your tape is con-

> cerned, it's going to have to be established conclusively that there was someone else present when the statement was made. She also may testify as to anything that she may have said, but not in a manner that would repeat what Mr. Kapnison had told her or would indicate the answer or statement that Mr. Kapnison had made to her. And this is my plan at this time. If you gentlemen want to think about it and talk about it in the morning, you can do so.

R. Vol. VII at p. 1262.

The district court strictly enforced this ruling. It is true, as Kapnison alleges, that Natalyn testified in detail relative to the splitting of loan fees between Bronstein, Harenberg, and himself. However, Natalyn testified as a participant, and not, as Kapnison alleges, on information acquired from him during the course of their marriage:

> Q (Mr. Smith) Let me ask you if you took part in any loan practices engaged in jointly by Mr. Bronstein, Mr. Kapnison and Mr. Harenberg concerning loans and loan guaranty fees for loans issued through the First National Bank of Clovis?
>
> A (Natalyn Kapnison) Yes, sir, I did.

R. Vol. VIII at pp. 1293-1294.

Thus, Natalyn acknowledged that she was an active participant in the loan fee scheme. Natalyn further testified in detail relative to: a meeting during the summer of 1979, attended by Bronstein, Harenberg, Kapnison, and herself, during the course of which she personally gave Bronstein and Harenberg each $66,666.00 as their share of a loan fee (R., Vol. VIII at p. 1300-1301); her participation at six or seven meetings in which there was a

three-way division of funds (R., Vol. VIII at p. 1302); a meeting between Bronstein, Harenberg, Kapnison, and herself during which she expressed concern over who would pay the taxes on the loan fees, since the Kapnisons were reporting the entire amount of the fees as income even though the fees were being split three ways (R., Vol. VIII at p. 1303); the fees being divided on a one-third basis so that Bronstein and Harenberg would not have to pay taxes on their share of the fees and so that "nobody would know about it, just the four of us" (R., Vol. VIII at p. 1305); her possession of a yellow paper which recorded the loans made through Bronstein and Kapnison from the First National Bank of Clovis and set forth the amount of the loans and the amount of the loan fees for Bronstein, Harenberg, and Kapnison (R., Vol. VIII at p. 1314). Natalyn also testified in detail relative to the manner in which she would withdraw large amounts of cash from her bank and thereafter distribute the cash to Bronstein and Harenberg for their prorata share of the loan fees. Under such circumstances her testimony was admissible under the "crime-fraud" exception to the marital communications privilege recognized in conspiracy cases. When a husband and wife conspire, they form a "partnership in crime" and extrajudicial statements made in furtherance of the criminal activity may, by consent of the witness-spouse, be used against the other.

In *United States v. Price*, 577 F.2d 1356 (9th Cir. 1978), *cert. denied*, 439 U.S. 1068 (1978), the Witness-spouse's husband was prosecuted for transportation of women in interstate commerce for purposes of prostitution. The court held that where the husband and wife are engaged in a criminal conspiracy, extrajudicial statements of either made in furtherance of the conspiracy may be admitted against the other. The court agreed with Learned

Hand's observation that when a husband and wife become involved in a partnership of crime what one does or says pursuant to a common purpose, all do. *See also, United States v. Mendoza*, 574 F.2d 1373 (5th Cir. 1978), *cert. denied*, 439 U.S. 988 (1978) (a crime in which the husband and wife were jointly involved did not prevent admission of conversations between them relative thereto, notwithstanding the marital communications privilege).

The Supreme Court, in *United States v. Nixon*, 418 U.S. 683 (1974), cautioned that all privileges should be construed narrowly. They are in derogation of the search for truth. Fed. R. Evid. 501 contains a congressional mandate that a privilege must be interpreted in the light of reason and experience. Thus, in *United States v. Entrekin*, 624 F.2d 597 (5th Cir. 1980), *cert. denied*, 451 U.S. 971 (1981), the court, while recognizing that confidential marital communications remain privileged after *Trammel, supra*, still indicated that the privilege does not apply where the conversations between the husband and wife were made in furtherance of conspiracy to commit mail fraud. Natalyn's testimony was clearly not in violation of the marital communications privilege under the facts herein.

II

Kapnison contends the district court erred in denying his motion for severance of the eighteen counts. Kapnison moved for a severance of counts some twelve days before trial. Although Kapnison acknowledges that the district court has the discretion to sever or not to sever, and that the counts could be properly joined under Fed. R. Crim. P. 8(a), 18 U.S.C.A., if they were part of a common scheme or plan, Kapnison argues that we should apply the more "enlightened" rule and find that such a trial of

joined offenses is inherently prejudicial and should be avoided. Kapnison contends that in view of "the extreme difficulty in segregating the evidence as it related to various counts of the indictment," his motion for severance should have been granted. [Appellant's Brief at 40].

We hold that the district court did not err in refusing to sever the counts. The counts were properly joined under Red. R. Crim. P. 8(a), 18 U.S.C.A., as they were "based on the same act or transaction or on two or more acts or transactions connected together or constituting parts of a common scheme or plan." Furthermore, Kapnison has failed to establish that the refusal to sever the counts was prejudicial. In *United States v. Valentine*, 706 F.2d 282, 289-90 (10th Cir. 1983), we noted:

> "[t]he decision to grant a severance is within the sound discretion of the trial court and its decision will not ordinarily be reversed in the absence of a strong showing of prejudice." *United States v. Straud*, 617 F.2d 571 575 (10th Cir.), *cert. denied*, 449 U.S. 841, 101 S.Ct. 120, 66 L.Ed.2d 48 (1980). The burden of the defendant to show an abuse of discretion in this context is a difficult one. *United States v. Van Scoy*, 482 F.2d 347 (10th Cir. 1973).
>
> We feel, however, that there was no essential unfairness when the relationship of the charges grew out of the defendant's own conduct. Moreover, the mere fact that a defendant may have a better chance for acquittal by separate trials of charges is not sufficient to require severance.

III

Kapnison contends that he was prejudiced by extensive pretrial publicity which tainted the jury panel. Kapnison argues that although his trial was moved from Albuquer-

que to Roswell, Harenberg's conviction three weeks prior to his trial generated extensive and far-reaching publicity prejudical to his case, necessitating individual voir dire of the jury panel. Kapnison argues that the brief individual examination of the prospective jurors by the district court, at the bench, was inadequate. We disagree.

Kapnison's trial was moved from Albuquerque to Roswell at his request. Kapnison did not object to being tried in Roswell until nine days prior to his trial, after Harenburg had been convicted. Thereafter, during the course of voir dire in Kapnison's case, the district court individually questioned each of the prospective jurors who indicated they had read or heard about the lawsuit. These inquiries were conducted on an individual basis, at the bench, out of the hearing of the other jurors. Kapnison contends that the individual questioning by the court was too brief and inadequate to assure that he was not unfairly prejudicad by the publicity surrounding his trial.

The record before us reflects very clearly the district court's sensitivity to the publicity surrounding the case and the most adequate manner in which the court questioned the fourteen prospective jurors who indicated they had read or heard about the case. In so doing, the court fulfilled its obligation under Fed. R. Crim. P. 21(a), 18 U.S.C.A., to determine whether "there exists in the district where the prosecution is pending so great a prejudice against the defendant that he cannot obtain a fair and impartial trial." We hold there was a reasonable basis for concluding the jury was fair and impartial, and, hence, there was no requirement that the trial be moved because of adverse pretrial publicity. *See United States v. Hueftle*, 687 F.2d 1305, 1310 (10th Cir. 1982).

IV.

Kapnison contends his right to a fair trial was violated by the selective enforcement of the marital privilege regarding confidential communications. Kapnison argues that he "stands convicted of 17 criminal counts as the result of the testimony of Natalyn Kapnison, his former wife" and that Natalyn "both violated the privilege in her testimony and used it to shield herself from legitimate inquiry during cross-examination." [Appellant's Brief at 46-47].

As set forth in part I. of this opinion, *supra*, Natalyn voluntarily testified under a grant of immunity from the United States. Under *Trammel v. United States*, *supra*, her testimony was admissible since "the witness-spouse alone has a privilege to refuse to testify adversely; the witness may be neither compelled to testify nor foreclosed from testifying." 445 U.S. at 53. Furthermore, Natalyn's testimony arose as a result of her participation in an ongoing conspiracy, not as a result of a marital relationship. Natalyn's testimony was, accordingly, properly admitted, under the "crime-fraud" exception privilege to the marital communications privilege discussed *supra* in I.

V.

Kapnison contends that the charts and summary testimony of the government's expert witness, I.R.S. Agent B. W. Wilson, improperly emphasized and repeated evidence produced by the government, unlawfully bolstered the credibility of the government's witnesses, and violated his right to a fair trial.

Prior to testifying, Agent Wilson was determined by the district court to be qualified as an expert in tax matters and in the preparation of tax returns. In testi-

fying and presenting the charts objected to, Agent Wilson summarized the numerous government exhibits[1] and the testimony of certain witnesses. In doing so, Agent Wilson specifically stated that he was summarizing the governments case based on the testimony and physical evidence before the court, and that he was not vouching for the truthfulness of the prior testimony or the accuracy of the physical evidence. The district court also thoroughly and carefully instructed the jury that an expert's opinion was to be afforded only such weight as they felt it deserved, and they could disregard the expert's opinion entirely. Agent Wilson's summary of the evidence were not evidence, but merely summaries, the accuracy and reliability of which were to be determined by the testimony and exhibits admitted into evidence. Under these circumstances, we hold that the charts and summary testimony of Agent Wilson were properly admitted.

The use of summaries is proper. ***United States v.*** *Kaatz*, 705 F.2d 1237 (10th Cir. 1983); Fed. R. Evid. 1006. Summaries may be properly put before a jury with limiting instructions. *United States v. Kaatz, supra*; *United States v. Scales*, 594 F.2d 558 (6th Cir. 1979), *cert. denied*, 441 U.S. 946 (1979).

Kapnison does not contend that the charts were false or that the court's limiting instructions relative to the charts and Agent Wilson's testimonal summary were inadequate or that the jury failed to understand or follow the instructions. Nor does Kapnison contend that Agent Wilson testified falsely or that he (Kapnison) was unable to properly and adequately voir dire Agent Wilson

[1] **"Over six dozen government exhibits consisting almost exclusively of documents and records, frequently in many dozen pages." Government's Brief at 27.**

relative to his tax expertise, or adequately cross-examine him. Rather, Kapnison merely summarily argues that the charts and testimony of Agent Wilson improperly emphasized and repeated the government's evidence and unlawfully bolstered the credibility of the government witnesses.

We reject such an argument. Kapnison was represented by able counsel who vigorously cross-examined Agent Wilson. Contrary to Kapnison's underlying contention, charts and testimony of summary witnesses are admissible under the conditions and circumstances of this case. *See also United States v. Behrens*, 689 F.2d 154 (10th Cir. 1982), *cert. denied*, ... U.S. ... (chart may be introduced to aid jury in organizing evidence); *United States v. King*, 616 F.2d 1034 (8th Cir. 1980), *cert. denied*, 446 U.S. 969 (1980) (testimony of summary witness may be received so long as she bases her summary on evidence received in the case and is available for cross-examination).

VI.

Kapnison contends the district court erred by refusing to allow him to introduce the deposition testimony of Bronstein.

Prior to Kapnison's trial, Bronstein filed an affidavit in which he stated that if called to testify he would invoke his fifth amendment privilege and refuse to testify on behalf of Kapnison. The government conceded that under such circumstances, Bronstein was "unavailable" under Fed. R. Evid. 804(a) (1).

During his trial, Kapnison attempted to offer a deposition of Bronstein as substantive evidence. The deposition was taken during the course of a civil action brought by

Bank against a borrower who had acquired his loan by paying a kickback to Kapnison, Harenberg, and Bronstein, and who had subsequently defaulted on the loan. Within the deposition, Bronstein repeatedly denied working on the loan or receiving any benefit, consideration, value, or money in connection with the making of the loan. Bronstein's deposition corroborated Kapnison's trial testimony. The district court refused to allow Kapnison to introduce the deposition.

Kapnison argues that the deposition should have been admitted even though the United States did not have the opportunity to cross-examine Bronstein during the deposition, because Bronstein was cross-examined during the civil trial. Kapnison contends that because Bronstein was cross-examined and in view of the identity of facts, issues, and interests in his criminal case and the civil case, the deposition had adequate indicia of reliability under *Ohio v. Roberts*, 448 U.S. 56 (1980), and was admissible. We hold the district court properly excluded the deposition.

Bronstein's deposition was not admissible under Fed. R. Evid. 804(b)(1) when, as here, the United States did not have the opportunity to cross-examine him. Rule 804(b)(1) provides in part:

> (b) *Hearsay exceptions. The following are not excluded by the hearsay rule* if the declarant is unavailable as a witness:
>
> (1) *Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition* taken in compliance with law in the course of the same or another proceeding, *if the party against whom the testimony is now offered*, or, in a civil action or proceeding, a predecessor in interest, *had an opportunity and similar motive to*

develop the testimony by direct, cross, or redirect examination. [Emphasis supplied].

Since the government, as the "party against whom the testimony is now offered," has never had the "opportunity to develop the testimony [of Bronstein] by direct, cross or redirect examination," the district court correctly refused to allow the introduction of the deposition. Kapnison is simply seeking to introduce depositional testimony without cross-examination. This is not a *California v. Green*, 399 U.S. 149 (1970), situation in which a witness' preliminary hearing statements were held admissible at trial:

> Porter's statement at the preliminary hearing had already been given under circumstances closely approximating those that surround the typical trial. Porter was under oath; respondent was represented by counsel—the same counsel in fact who later represented him at the trial; respondent had every opportunity to cross-examine Porter as to his statement; and the proceedings were conducted before a judicial tribunal; equipped to provide a judicial record of the hearings.

399 U.S. at 165.

Nor does the taking of Bronstein's deposition in an unrelated civil action give rise to any "indicia of reliability" for purposes of its introduction in a criminal proceeding against Kapnison. As the Court opined in *Ohio v. Roberts*, *supra* at 65-66.

> In sum, when a hearsay declarant is not present for cross-examination at trial, the Confrontation Clause normally requires a showing that he is unavailable. Even then, his statement is admissible only if it bears adequate "indicia of reliability." Reliability can be inferred without more in a case where the evidence

> falls within a firmly rooted hearsay exception. In other cases, the evidence must be excluded, at least absent a showing of particularized guarantees of trustworthiness. [Footnotes excluded].

VII.

Kapnison contends the district court erred in allowing the government to cross-examine Harenberg about the "Carlucci transaction" and that the admission of the evidence gave rise to "unfair prejudice" in violation of Fed. Rules Evid. Rule 403, 28 U.S.C.A.

Harenberg testified on behalf of Kapnison. He generally denied any wrongdoing. Thereafter, during the course of cross-examination, in an attempt to discredit Harenberg, the government questioned him about the "Carlucci transaction." In response to questioning by the government, Harenberg acknowledged that he participated in opening a savings account for a Mr. Carlucci, that the account was opened with $53,000 in cash which Bronstein gave him, that he later withdrew $23,000 in cash from the account upon instructions from Bronstein, and that he delivered the $23,000 to Mr. Carlucci in Bronstein's office where he met him for the first time.

At the conclusion of the government's cross-examination of Harenberg, the court cautioned the jury:

> You may step down for the afternoon. This testimony that you have just heard about the Carlucci account did not involve money that either Mr. Kapnison or Mr. Harenberg or Mr. Bronstein were dealing with. It was money that belonged to Mr. Carlucci. They never had any use of it, never made any claim on it of any kind or character. The evidence is offered to you only for the purpose of showing the management and control of the bank on this particular occasion

and how they handled this particular deposit. And you should consider it for no other purpose. The cash, itself, has nothing whatever to do with this lawsuit.

R., Vol. XII at 2477-78.

We hold that the error, if any, generated by the government's cross-examination of the "Carlucci transaction" was corrected by the district court's cautionary charge and that Kapnison's argument that Harenberg's cross-examination was prejudicial and gave rise to reversible error under Rule 403 is without merit. Harenberg testified in Kapnison's defense and generally denied any wrongdoing. Under such circumstances, Harenberg was open to cross-examination relative to his association with Kapnison and the manner in which he functioned as president of Bank, including the "Carlucci transaction," *United States v. Tisdale*, 647 F.2d 91 (10th Cir. 1981); *United States v. Calabrese*, 645 F.2d 1379 (10th Cir. 1981); *United States v. Logan*, 641 F.2d 860 (10th Cir. 1981); Fed. Rules Evid. Rule 404(b), 28 U.S.C.A.

VIII.

Kapnison contends that prosecutorial misconduct occurred during closing arguments when the Assistant United States Attorney argued that Kapnison, Harenberg, and Bronstein had "robbed the bank as surely as if they had used a gun" [R., Vol. XIV at 2799] and made repeated similar references to the use of a gun. Kapnison also contends that a second Assistant United States Attorney compounded the error in rebuttal closing argument by injecting his personal belief in the guilt of Kapnison. We disagree. We hold that the comments objected to did not give rise to reversible error.

This is not a case in which the prosecutor has expressed

his or her personal beliefs concerning the evidence or witnesses, *United States v. Gabriel*, 715 F.2d 1447 (10th Cir. 1983), nor a case in which the prosecutor stated his personal belief that the defendant was guilty. *United States v. Ainesworth*, 716 F.2d 769 (10th Cir. 1983). In *Ainesworth* we reviewed the conditions under which prosecutorial misconduct during closing argument could give rise to reversible error:

> Allegations of prosecutorial misconduct implicate the due process rights of a defendant. *United States v. Carleo*, 576 F.2d 846, 851 (10th Cir.), *cert. denied*, 439 U.S. 850, 99 S.Ct. 153, 58 L.Ed.2d 152 (1978). Due process will not permit a prosecutor to use his closing argument to testify to a jury. *United States v. Segal*, 649 F.2d 599, 604 (8th Cir. 1981); *United States v. Latimer*, 511 F.2d 498, 503 (10th Cir. 1975). Thus, he may not, without qualification, express his personal opinion as to certain evidence or that the accused is guilty of the crime charged. *Segal*, 649 F.2d at 604; *United States v. Rios*, 611 F.2d 1335, 1343 (10th Cir. 1979). Similarly, he may not mention facts not in evidence to support a finding of guilt. *Latimer*, 511 F.2d at 503; *Marks v. United States*, 260 F.2d 377, 383 (10th Cir. 1958), *cert. denied*, 358 U.S. 929, 79 S.Ct. 315, 3 L.Ed.2d 302 (1959), he may not personally attest to the credibility of government witnesses or attack the credibility of defense witnesses, *Carleo*, 576 F.2d at 852; *United States v. Ludwig*, 508 F.2d 140, 143 (10th Cir. 1974), nor may he place his own integrity and credibility in issue. *Latimer*, 511 F.2d at 503; *Ludwig*, 508 F.2d at 140; *United States v. Perez*, 493 F.2d 1339, 1343 (10th Cir. 1974).

716 F.2d at 771.

Kapnison's challenges to the prosecutor's closing argument comments are without merit. Nor did the prosecutor's repeated references[2] to the commission of a crime,

[2] Kapnison sets forth three references to the use of the word "gun."

just as "if a gun were used," give rise to reversible error. Every slight excess of the prosecution does not require that a verdict be overturned and a new trial ordered. *United States v. Coppola*, 526 F.2d 764 (10th Cir. 1975) [quoting *Aiuppa v. United States*, 393 F.2d 597 (10th Cir. 1968), *cert. denied*, 404 U.S. 871 (1971)].

IX.

Kapnison contends that the district court improperly instructed the jury and thereby prejudiced his right to a fair trial. We disagree. We have reviewed the instructions in detail and hold that the district court adequately and properly instructed the jury. The district court instructed on Kapnison's defenses, and although the wording of the instructions may not have paralleled Kapnison's proffered instructions, the instructions of the district court were adequate. In *United States v. Jenkins*, 701 F.2d 850 (10th Cir. 1983), we stated:

> Where there is evidence in the record supporting his theory, a defendant in a criminal case is entitled to an instruction to the jury concerning his theory of defense and failure to so instruct is reversible error. *See United States v. Felsen*, 648 F.2d 681, 685-86 (10th Cir. 1981), *cert. denied*, 454 U.S. 861, 102 S.Ct. 317, 70 L.Ed.2d 159 (1981); *United States v. Posey*, 647 F.2d 1048, 1052-53 (10th Cir. 1981); *United States v. Hoopes*, 545 F.2d 721 (10th Cir. 1976), *cert. denied*, 431 U.S. 954, 97 S.Ct. 2675, 53 L.Ed.2d 270 (1977). However the instructions submitted by defendant need not be given in the form requested, if the issues of the case are adequately covered in the charge. *United States v. Nolan*, 551 F.2d 266, 274-75 (10th Cir. 1977), *cert. denied*, 434 U.S. 904, 98 S.Ct. 302, 54 L.Ed.2d 191 (1977); *United States v. Newson*, 531 F.2d 979, 983 (10th Cir. 1976). The sufficiency of the instructions is not determined by the giving or omission of particular instructions but by viewing the charge as a whole.

United States v. Burns, 624 F.2d 95, 105 (10th Cir. 1980), *cert. denied*, 449 U.S. 954, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980); *United States v. Westbo*, 576 F.2d 285, 289 (10th Cir. 1978); *United States v. Beitscher*, 467 F.2d 269, 273 (10th Cir. 1972).

701 F.2d at 858.

X.

Kapnison contends that the evidence was insufficicent to warrant a conviction on Counts V, VI, VIII, X, XII, XIV,[3] XV, XVI, XVII, and XVIII, under which he was charged with violating 18 U.S.C.A. § 215[4] (Section 215) and 18 U.S.C.A. § 656 [5] (Section 665). Kapnison does not challenge the sufficiency of the evidence as to Counts VI, IX, XI, and XIII under which he was charged with violating Section 215.

In *United States v. Twiford*, 600 F.2d 1339, 1343 (10th

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[3] We decline to speculate why Kapnison challenges the sufficiency of the evidence on Count XIV, of which he was acquitted.

[4] Section 25 provides in part:

Whoever, being an officer, director, employee, agent, or attorney of any bank, the deposits of which are insured by the Federal Deposit Insurance Corporation, . . . except as provided by law, stipulates for or receivs or consents or agrees to receive any fee, . . . for procuring or endeavoring to procure for such person, firm, or corporation, or for any other person, firm, or corporation, from any such bank or corporation, any loan . . . shall be fined not more than $5,000 or imprisoned not more than one year or both.

[5] Section 656 provides in part:

Whoever, being an officer, director, agent or employee of, or connected in any capacity with any Federal Reserve bank, member bank, national bank or insured bank, . . . embezzles, abstracts, purloins or willfully misapplies any of the moneys, funds or credits of such bank or any moneys, funds, assets or securities intrusted to the custody or care of such bank, or to the custody or care of any such agent, officer director, employee or receiver, shall be fined not more than $5,000 or imprisoned not more than five years, or both . . .

Cir. 1979), we set forth the statutory elements of both a section 656 and a section 215 violation:

> The statutory elements of a section 656 misapplication violation are: (1) the willful (2) misapplication (3) of money, funds, or credits (4) of a federally protected bank . . . the elements of a section 215 offense are: (1) the receiving or consenting to receive (2) a fee, commission, gift, or thing of value (3) for procuring or attempting to procure (4) a loan (or certain other benefits) from a federally protected bank.

In reviewing Kapnison's challenge to the sufficiency of the evidence, we must view all the evidence, both direct and circumstantial in the light most favorable to the government, *United States v. Massey*, 687 F.2d 1348 (10th Cir. 1982); *United States v. Blistein*, 626 F.2d 774 (10th Cir. 1980), *cert. denied*, 449 U.S. 1102 (1981), to determine if the government established Kapnison's various violations of section 215 and section 656.

Kapnison contends that Counts V and VI should have been dismissed because the government failed to prove that he "procured" a loan under section 215 or that there was a "willful misapplication" of funds under section 656. We disagree. The testimony of Dr. Goodman [R., Vol. V at 593-6461] adequately provides the evidence for that which Kapnison characterizes as an "aboslute failure of proof" under Counts V and VI.

Kapnison's remaining allegations of error vis-a-vis insufficiency of the evidence are similarly rebutted by our review of the record. Having carefully reviewed the record in accordance with *United States v. Massey*, *supra*, we hold the evidence was sufficient.

XI.

Kapnison's allegation that the kickbacks he received were not Bank's funds but the funds of the individual borrowers, and that he accordingly could not be convicted of the willful misapplication of bank funds is specious. *See United States v. Twiford, supra*; *United States v. Cooper*, 464 F.2d 648 (10th Cir. 1972), *cert. denied*, 409 U.S. 1107 (1973); *United States v. Fortunato*, 402 F.2d 79 (2nd Cir. 1968), *cert. denied*, 394 U.S. 933 (1969).

WE AFFIRM.

No. 82-1850, UNITED STATES v. KAPNISON
LOGAN, Circuit Judge, concurring:

I join in the court's opinion except insofar as it relies upon a crime-fraud exception to the marital confidential communications privilege. I would not limit that privilege for the reasons stated in my concurring opinion in *United States v. Neal*, ... F.2d .... (No. 82-1803, 10th Cir. 1984), entered this day. However, I believe the trial court here properly applied the confidential communications privilege. I therefore agree that the conviction should be affirmed.

NO. 82-1850 - UNITED STATES v. KAPNISON
JENKINS, District Judge, concurring:

I concur in the judgment of the court. The principle in this case is the same as that set forth in *United States v. Neal*, ... F.2d .... (No. 82-1803, 10th Cir. 1984) entered this day. As suggested in my concurring opinion in *Neal*, before one may apply an exception to a rule against the disclosure of a confidential marital communication

one must first decide that the disclosure is in fact such a communication. In my opinion the testimony received in this case is not such a disclosure and thus the question of Crime/Fraud exception need not be reached.

As to the remaining issues, I concur in the court's opinion.

Supreme Court, U.S.
FILED
MAR 26 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-971

In the Supreme Court of the United States

OCTOBER TERM, 1984

NICK KAPNISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of due process of law by the trial court's exclusion of deposition testimony of petitioner's co-defendant, taken in a civil proceeding to which the United States was not a party.

2. Whether admission of testimony by petitioner's ex-wife violated the confidential marital communications privilege.

3. Whether the trial court selectively enforced the confidential marital communications privilege.

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In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 84-971

NICK KAPNISON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. a1-a25) is reported at 743 F.2d 1450.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 1984. A petition for rehearing was denied on October 22, 1984. The petition for a writ of certiorari was filed on December 19, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted on one count of conspiring to impede the United States in its collection of income taxes, in violation of 18 U.S.C. 371; one count of making a false tax return, in violation of 26

U.S.C. 7206(1); six counts of participating in the misapplication of funds of a bank insured by the Federal Deposit Insurance Corporation, in violation of 18 U.S.C. 656; and seven counts of participating in a loan kickback scheme, in violation of 18 U.S.C. 215. Petitioner was sentenced to two years' imprisonment on the conspiracy count. In addition, he was fined $10,000 on the conspiracy count and $5,000 each on the tax count and one of the banking counts. Petitioner's sentences on the remaining counts were suspended in favor of five years' probation, conditioned on performance of certain community service requirements.[1]

1. The evidence at trial showed that petitioner, an Albuquerque, New Mexico businessman, along with Ben Bronstein, the owner of the First National Bank of Clovis, and Henry Harenberg, the president of the bank, conspired to obtain loans for various borrowers, received kickbacks from the borrowers, and divided the kickbacks among themselves without correctly reporting their respective incomes. Petitioner or Bronstein would initiate the loans, petitioner would guarantee or broker the loans and receive a fee from the proceeds of the loans, and Harenberg would cause the loans to be approved. The proceeds of the fees paid to petitioner were divided among the three.

Petitioner was tried separately from his co-conspirators. Prior to petitioner's trial, Bronstein filed an affidavit stating

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[1]Petitioner's co-conspirator Henry Harenberg was convicted at a separate trial on most of the same counts as petitioner. Harenberg was sentenced to 18 months' imprisonment on the conspiracy count and was fined $10,000 on the conspiracy count and $5,000 each on a tax count and one of the banking counts; his sentences on the remaining counts were suspended in favor of five years' probation, conditioned on performance of certain community service requirements. Co-conspirator Ben Bronstein pleaded guilty to four counts of the indictment; he was sentenced to a two-year term of imprisonment and a total of $20,000 in fines.

that if called to testify he would invoke his Fifth Amendment privilege and refuse to testify on behalf of petitioner. The government conceded that Bronstein was "unavailable" within the meaning of Fed. R. Evid. 804(a)(1). Pet. App. a15. During his trial, petitioner attempted to offer in evidence the transcript of a deposition of Bronstein, which had been taken during the course of a civil action then pending in state court. In that civil action, the First National Bank of Clovis had sued a borrower who had defaulted on a loan he had obtained by paying a kickback to petitioner, Bronstein, and Harenberg. In the deposition, Bronstein denied working on the loan or receiving any benefit in connection with the making of the loan. The district court excluded the deposition from evidence. *Id.* at a15-a16.

At trial, a number of witnesses testified against petitioner, including his ex-wife Natalyn Kapnison. The trial court ruled that Mrs. Kapnison could testify about acts, petitioner's statements made in the presence of third parties, and her own statements, but not about anything petitioner related to her during the course of their marriage (Pet. App. a7-a8). Direct and cross-examination were confined to these matters (*id.* at a8). At the conclusion of her testimony, Mrs. Kapnison asserted the marital communications privilege with respect to any confidential communications she had made to petitioner during their marriage (8 Tr. 1480-1481).

2. The court of appeals affirmed petitioner's convictions (Pet. App. a1-a25). The court held that Mrs. Kapnison testified voluntarily and that her testimony did not violate either the privilege against adverse spousal testimony or the privilege for confidential marital communications (*id.* at a3-a10). The court further held, inter alia, that the trial court did not err in denying petitioner's motion for severance of some counts (*id.* at a10-a11); that petitioner was not

unfairly prejudiced by pretrial publicity (*id.* at a11-a12); that the trial court properly applied the privilege for confidential marital communications (*id.* at a13); that charts and summary testimony of an expert witness for the government were properly admitted (*id.* at a13-a15); that the trial court properly excluded from evidence the deposition testimony of Bronstein (*id.* at a15-a18); and that there was sufficient evidence in the record to support the convictions (*id.* at a22-a23).[2]

ARGUMENT

1. Petitioner contends (Pet. 11-14) that the exclusion of co-conspirator Bronstein's deposition testimony deprived him of due process of law. Petitioner did not allege below that exclusion of the testimony amounted to a constitutional violation. See Appellant's C.A. Opening Br. 60-68; 13 R. 2482-2483. In any event, his contention is without merit.

Bronstein's deposition was taken in a civil proceeding involving the First National Bank of Clovis and one of its borrowers. The United States was not a party to that proceeding. In the course of his deposition Bronstein denied that he had participated in the processing of the loan at issue in the civil case or that he had derived any benefit from the loan.

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[2]Judge Logan and District Judge Jenkins, sitting by designation, concurred, but declined to join in Judge Barrett's application of the "crime-fraud" exception to the confidential marital communications privilege, citing their concurring opinions in *United States* v. *Neal*, 743 F.2d 1441 (10th Cir. 1984), cert. denied, No. 84-5951 (Mar. 25, 1985). Judges Logan and Jenkins concluded that petitioner's claim based on the privilege was without merit because the testimony he challenged did not involve confidential marital communications. Pet. App. a24-a25.

In *Neal*, the same panel rejected a claim that the confidential marital communications privilege had been violated. As in this case, Judge Barrett rested his conclusion on application of the crime-fraud exception to the privilege, while Judges Logan and Jenkins concluded that the testimony involved did not involve confidential marital communications.

It is clear that Bronstein's deposition testimony was not admissible under Fed. R. Evid. 804(b)(1); indeed, petitioner does not contend otherwise. Rule 804(b)(1) provides that former testimony is not excluded by the hearsay rule "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination." The plain language of the rule precludes the use of prior testimony when the party against whom the evidence is offered did not have a meaningful opportunity in the prior proceeding to develop that testimony. See, *e.g., United States* v. *Lanci*, 669 F.2d 391, 394 (6th Cir.), cert. denied, 457 U.S. 1134 (1982); *Government of the Canal Zone* v. *P. (Pinto)*, 590 F.2d 1344, 1353-1354 (5th Cir. 1979); *United States* v. *Wingate*, 520 F.2d 309, 315-316 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976). Since the United States was not a party to the civil proceeding in which Bronstein's deposition was taken, it had no opportunity to cross-examine him. Thus, the deposition testimony constituted inadmissible hearsay as against the government.

Petitioner nevertheless contends that the Bronstein deposition testimony should have been admitted because it bore sufficient indicia of reliability. In support of that contention, he relies on *Chambers* v. *Mississippi*, 410 U.S. 284 (1973); *United States* v. *Benveniste*, 564 F.2d 335 (9th Cir. 1977); and *Zeigler* v. *Callahan*, 659 F.2d 254 (1st Cir. 1981). However, *Chambers* and *Benveniste* both involved declarations against penal interest. Such declarations generally are regarded as reliable because persons do not normally make statements that are damaging to themselves unless they believe them to be true. See *Chambers*, 410 U.S. at 299; Fed. R. Evid. 804(b)(3) advisory committee note. Bronstein's self-serving deposition testimony, in which he merely denied his involvement in the crime, clearly does not

bear the same indicia of reliability as a declaration against interest. Compare, *e.g.*, *United States* v. *Wingate*, 520 F.2d at 316.

Nor does *Zeigler* v. *Callahan* support petitioner's contention. There the court of appeals held that, assuming the admissibility of grand jury testimony of an absent witness who denied his involvement in the crime, the trial court's failure to admit that testimony was harmless error in light of the strength of the government's evidence and because it was most unlikely that the jury would have believed the absent witness's self-serving account. 659 F.2d at 270. Here, as in *Zeigler*, admission of the testimony at issue would not have affected the outcome of the case. Numerous witnesses testified concerning petitioner's participation in the kickback scheme, while both petitioner and Harenberg testified that they had not engaged in any wrongdoing. Admission of Bronstein's similar self-serving denials would have added little to petitioner's defense.[3]

2. Petitioner also contends (Pet. 14-18) that admission of testimony by his ex-wife violated the privilege for confidential marital communications.[4] Petitioner does not specify

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[3]Petitioner suggests (Pet. 13-14) that the courts are divided concerning admissibility under various hearsay exceptions (*e.g.*, Fed. R. Evid. 804(b)(5)) of grand jury testimony and testimony given at a preliminary hearing. This case does not involve those categories of testimony. Moreover, petitioner's counsel did not seek to introduce the Bronstein testimony on grounds other than Rule 804(b)(1). See 13 Tr. 2482-2484; Fed. R. Evid. 103(a); Fed. R. Crim. P. 51. In any event, the cases cited by petitioner are not in conflict; the outcomes rested primarily on the courts' differing evaluations of the reliability of the testimony in each case. Here the government's lack of opportunity to cross examine Bronstein, the self-serving nature of his testimony, and the absence of significant corroborating evidence establish that Bronstein's testimony did not bear sufficient indicia of reliability to be admissible, even if petitioner's counsel had sought its admission under Rule 804(b)(5).

[4]Petitioner and his ex-wife were married during the time of the events described in the indictment.

what portions of his ex-wife's testimony he regards as having violated the privilege. However, in the court of appeals he objected primarily to Mrs. Kapnison's testimony about the splitting of the loan fees among Bronstein, Harenberg, and petitioner (see Pet. App. a8-a9). This Court has recognized the existence of a privilege for confidential marital communications. See *Trammel* v. *United States,* 445 U.S. 40, 45 n.5, 51 (1980). The court of appeals correctly concluded, however, that the privilege does not apply in the circumstances of this case.[5]

The privilege may shield the acts of a spouse from disclosure if those acts were intended to be communicative and confidential. See, *e.g.,* 8 J. Wigmore, *Wigmore on Evidence* § 2337, at 657-658 (McNaughton reved. 1961). But the privilege does not prevent a witness-spouse from testifying about noncommunicative acts she has observed or about conversations that took place in the presence of third parties. See, *e.g., Pereira* v. *United States,* 347 U.S. 1, 6-7 (1954); *Wolfle* v. *United States,* 291 U.S. 7, 14-15 (1934). The trial court in this case specifically ruled that Mrs. Kapnison would not be allowed to testify about anything petitioner related to her outside the presence of third parties during the course of their marriage; the court concluded that Mrs. Kapnison "can testify as to acts. She can testify as to statements that were made in the presence of others * * *. She also may testify as to anything that she may have said, but not in a manner that would repeat what [petitioner] had

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[5]Even if the privilege might have applied in this case, it is doubtful whether petitioner preserved it. At the trial of co-conspirator Harenberg, which was held approximately a month before petitioner's trial, Mrs. Kapnison testified to several private conversations with petitioner. Petitioner did not invoke the privilege in an attempt to prevent his ex-wife from testifying at Harenberg's trial. Thus, it is at least arguable that petitioner waived his privilege. Compare *United States* v. *Fisher,* 518 F.2d 836, 840-841 (2d Cir.), cert. denied, 423 U.S. 1033 (1975).

told her or would indicate the answer or statement that [petitioner] had made to her." Pet. App. a7-a8. That ruling was enforced throughout the trial (*id.* at a8). Mrs. Kapnison testified, inter alia, that she attended meetings with Bronstein, Harenberg, and petitioner at which she participated in distributing the loan fees and that she herself withdrew large amounts of cash from the bank and distributed pro rata shares of the loan fees to Bronstein and Harenberg (*id.* at a8-a9). Judges Logan and Jenkins concluded (*id.* at a24-a25) that Mrs. Kapnison's testimony did not involve any confidential communications. That fact-bound conclusion, which is fully supported by Judge Barrett's description of Mrs. Kapnison's testimony (*id.* at a8-a9), does not warrant review by this Court.

Assuming arguendo that Mrs. Kapnison's testimony concerned confidential marital communications, it nevertheless was admissible under the "crime-fraud" exception to the privilege. Under that exception, confidential marital communications are not protected by the privilege if they are made in furtherance of joint criminal activity of the spouses. *See, e.g., United States* v. *Sims,* No. 82-1523 (6th Cir. Feb. 28, 1985), slip op. 8-9; *United States* v. *Broome,* 732 F.2d 363, 365 (4th Cir. 1984), cert. denied, No. 84-118 (Oct. 1, 1984); *United States* v. *Ammar,* 714 F.2d 238, 257-258 (3d Cir.), cert. denied, 464 U.S. 936 (1983); *United States* v. *Entrekin,* 624 F.2d 597, 598 (5th Cir. 1980), cert. denied, 451 U.S. 971 (1981); *United States* v. *Price,* 577 F.2d 1356, 1364-1365 (9th Cir. 1978), cert. denied, 439 U.S. 1068 (1979); *United States* v. *Mendoza,* 574 F.2d 1373, 1379-1381 (5th Cir.), cert. denied, 439 U.S. 988 (1978); *United States* v. *Kahn,* 471 F.2d 191, 194-195 (7th Cir. 1972), cert. denied, 411 U.S. 986 (1973), rev'd on other grounds, 415 U.S. 143 (1974). Cf. *Clark* v. *United States,* 289 U.S. 1, 15 (1933) (describing crime-fraud exception to attorney-client privilege). Contrary to petitioner's suggestion, there is no disagreement among the courts of appeals concerning the existence of this

exception to the marital communications privilege.[6] This Court recently declined to grant review on this issue in a case decided by the same panel that decided this case. *Neal* v. *United States*, No. 84-5951 (Mar. 25, 1985). See page 4 note 2, *supra*. The present case, in which (as in *Neal*) only one member of the panel relied on the crime-fraud exception, clearly does not call for a different disposition.

3. Petitioner contends finally (Pet. 17-18) that the district court violated his due process rights by selectively enforcing the confidential marital communications privilege, thereby preventing him from confronting his ex-wife. He also suggests (*id.* at 11) that Mrs. Kapnison's answers to certain questions constituted a waiver of the privilege, but that she was then permitted to use the privilege to prevent petitioner from testifying about confidential communications. Those contentions are without merit.

Petitioner's claim of selective enforcement rests on the incorrect premise that his ex-wife was permitted to testify in violation of the marital communications privilege. As we explained above (page 7), the trial court strictly enforced its ruling barring Mrs. Kapnison from disclosing any confidential marital communications. Moreover, petitioner had ample opportunity to confront his ex-wife; his counsel cross-examined Mrs. Kapnison at considerable length. See 8 R. 1352-1472. And contrary to petitioner's present

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[6]In support of his contention that there is a conflict among the circuits on this point, petitioner cites *Appeal of Malfitano*, 633 F.2d 276 (3d Cir. 1980). However, the court in *Malfitano* declined to adopt a crime-fraud exception only with respect to the separate privilege against adverse spousal testimony. See also *In re Grand Jury Subpoena, United States of America, Hana Koecher*, No. 85-1033 (2d Cir. Feb. 28, 1985), petition for rehearing pending. As petitioner acknowledges (Pet. 14-15), subsequent to *Malfitano* the Third Circuit expressly recognized a crime-fraud exception to the confidential marital communications privilege. *United States* v. *Ammar*, 714 F.2d at 257-258.

contention, Mrs. Kapnison did not waive the confidential marital communications privilege during her testimony. In cross-examining Mrs. Kapnison, petitioner's counsel himself took particular care to ensure that the privilege remained intact. See 8 R. 1381-1383, 1458-1459, 1462. In any event, petitioner has identified no specific prejudice that he suffered as a result of the alleged selective enforcement. In this Court, as in the courts below (see Appellant's C.A. Opening Br. 46-52; 13 R. 2543-2544), petitioner has made no proffer concerning communications to which he might have testified if his ex-wife had been barred from asserting the confidential marital communications privilege. Thus, he has failed to present an adequate foundation for his selective enforcement claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1985

DOJ-1985-03